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IN THE

Supreme Court of the United States

No. 159

PACIFIC COAST WHOLESALERS ASSOCIATION,
Petitioner,

vs.

CLOVER LEAF FREIGHT LINES, INC., INTERSTATE DISPATCH, INC., JOHN W. DEVANNEY AND RALPH E. KINNEAR, CO-PARTNERS, DOING BUSINESS UNDER THE NAME AND STYLE OF MIDDLE STATES MOTOR FREIGHT, AND ROCKFORD MOTOR SERVICE, INC.,
Respondents.

RESPONDENTS' REPLY TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents will treat the petition for certiorari and supporting brief in sections and paragraphs identified by words or figures used in the petition for certiorari and in the supporting brief.

STATEMENT OF MATTERS INVOLVED.
(Petition, page 2.)

Petitioner's statement, while stressing the alleged independence existing between Transport Terminal Co. and the petitioner, gives but an imperfect picture of the scope and duration of the activities carried on by the Transport Terminal Co. in this District.

The additional facts are these. Respondents are common carriers of property by motor vehicle and are subject to the terms and provisions of the Interstate Commerce Act, Part II (U. S. C. A. Title 49, Sections 301-327), (R. 3, 5, 7, 8). From September 15, 1942 to December 13, 1945, the less carload (or less truckload) shipments involved in this case moved from various sources of supply in the East and Middle West under uniform standard bills of lading and were consigned to the petitioner in the care of Transport Terminal Co. at Chicago, Illinois (R. 3, 5, 7, 8, 25).

The facilities at which these shipments were delivered are operated by Transport Terminal Co. and at the time deliveries were made, the shipments were accepted and receipted for by "Transport Terminal, Agent for Pacific Coast Wholesalers Association." After their arrival at Chicago, they were loaded and shipped as consolidated carload shipments in railroad cars by the Transport Terminal Co. to Pacific Coast Wholesalers Association at various Pacific Coast destinations (R. 26, 27).

Transport Terminal investigated, checked, revised and paid the freight charges which the respondents, as well as all other carriers, rail, motor carrier or freight forwarder, claimed to be due on the respective movement from actual origin to point of delivery at Chicago under their published

tariff rates, and was subsequently reimbursed by the petitioner for the charges expended by Transport Terminal on its behalf. Transport Terminal also ascertained the charges which were to be paid by the individual members comprising petitioner's Association for the services performed in the handling and movements of each member's individual shipments (R. 26, 27, 37).

Transport Terminal, an Illinois corporation, was organized in 1942. Petitioner asserts that there is no common stock ownership existing as between the corporations and, despite the fact that Gus A. Olson, the general manager of petitioner, is also vice president of Transport Terminal Co., petitioner has not divulged the salary, if any, which Transport Terminal pays to Olson, nor have any facts been submitted to indicate the extent of his influence in the management of Transport Terminal.

Transport Terminal and petitioner operate under a contractual arrangement whereby Transport Terminal is paid a certain number of cents per hundred pounds for shipments handled by Transport Terminal for the petitioner, but the exact terms and conditions of this agreement have never been divulged.

This suit was instituted on May 14, 1946. On April 12, 1946, respondents' attorney notified petitioner's attorney that a lawsuit involving an issue with which the petitioner and its attorney were familiar would be instituted not later than April 25, 1946. Action was postponed in accordance with the advice given petitioner's attorney (R. 28-32). After Mr. Davis, president of Transport Terminal was served, he presumably forwarded the summons and complaint to Mr. Sol Smith, secretary of the petitioner, who received them on June 10, 1946, or fourteen days prior to the time allowed for filing of its answer (R. 35). Mr. Smith stated that he then engaged the services of a Chicago attorney but makes no mention of the date. He merely said that he was

not informed of the entry of the default judgments until July 12, 1946. It was not until August 6 that the original motion based on defense of improper venue was filed. Thus a period of almost two months elapsed between the time petitioner received the complaint and the time motion was filed.

Jurisdiction.

(Petition, page 5.)

The statements as to jurisdiction appear to be correct.

Questions Presented.

(Petition, page 5.)

None of the four questions listed in the petition for certiorari presents a question of law requiring disposition by this Court:

Question 1: The Circuit Court of Appeals did not decide the case solely upon the statements of fact contained in petitioner's question. It also considered the substantial, continuous and systematic nature of the business carried on in Illinois by the petitioner, through Transport Terminal's services, plus the additional fact that the underpayments of the freight charges were made by Transport Terminal.

Question 2: This again is a question of fact. Having found that the corporate agent's activities amounted to "presence" of the petitioner, the Circuit Court of Appeals correctly reasoned that the foreign corporation may not avoid service merely because the agent is a local corporation instead of an individual.

Question 3: The Circuit Court did not assume facts not in the record. Rather than this, petitioner improperly attempted to inject additional facts after the case had been

appealed, by not only discussing the merits of the case in its petition for rehearing, but attaching thereto an additional affidavit of Alfred D. Davis (R. 63-68).

Question 4: Petitioner here attempts to raise a question which has been settled by this Court since the establishment of the Federal Rules of Civil Procedure. The Circuit Court of Appeals correctly relied upon the decisions of the Court in its reference to *Industrial Assn.* v. *Commissioner,* 323 U. S. 310 and *Freeman* v. *Bee Machine Co.,* 319 U. S. 448.

Reasons Relied on for Allowance of the Writ.

(Petition, page 6.)

Rule 38, paragraph 5 (b) of this Court sets forth four reasons which, while not all inclusive, will be considered as grounds for granting a petition for certiorari. Petitioner submits four reasons, not one of which indicates why the merits of this case should be re-argued for the third time.

Reason 1: The decision of the Cricuit Court of Appeals does not conflict with any of the cases cited by petitioner. On the contrary, it is in direct conformity with the principles laid down by this Court in *International Harvester* v. *Kentucky,* 234 U. S. 579 and continuing through *International Shoe Co.* v. *Washington,* 326 U. S. 310.

Reason 2: Petitioner's claim that the decision of the Circuit Court of Appeals conflicts with *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.,* 205 U. S. 364, and *Cannon Mfg. Co.* v. *Cudahy Packing Co.,* 267 U. S. 333, is not well founded for the reason that in these cases, the Court held that the activities of the subsidiary organizations were not sufficient to justify finding that the parent was judicially present within the State. Obviously, if the principal is not present through its agent, its agent cannot be validly served.

Reason 3: The Transport Terminal Co. "investigated,

checked and revised" (R. 26) these charges. It must of necessity have arrived at a conscious determination of their correctness. By remitting charges lower than the published tariff level, it actually "reduced" its payments. It is not the manipulation of figures upon a freight bill which is determinative of the question, but the act of payment itself.

Reason 4: The promulgation of the Federal Rules of Civil Procedure does not affect *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.*, 278 U. S. 177. Rule 82 specifically provides that the Rules shall not be construed so as to limit or extend the power of the Courts in matters of venue. Rule 12 (b) and (h) actually incorporate the principle expressed in the *Commercial Casualty* case. Petitioner's question presents no new application of legal principles but attempts to reopen a question already well settled.

In conclusion, the essential problem herein is strictly factual in that the scope, duration, and activities of the Illinois corporation are measured to ascertain whether or not the petitioner is actually "present" or doing business in the State.

BRIEF.

I.

The Decision of the Circuit Court of Appeals That Petitioner Was Subject to Service of Process in Illinois Conflicts With a Long Line of Decisions of This Court.

(Petition, page 9.)

In its argument under this point, petitioner omits any reference to the activities of Transport Terminal, but is content to emphasize the alleged independence of the two corporations. Presumably because of its claimed independence, it urges that the Circuit Court of Appeals has overextended *International Shoe Co.* v. *Washington,* 326 U. S. 310, by holding in substance that the mere existence of a contract between the two corporations is sufficient to invoke the doctrine of that decision.

Petitioner, however, in stating that "there would be little doubt" except for the opinion of the *International Shoe Co.* v. *Washington,* 326 U. S. 310, bases its statement upon cases which hold that presence—and that alone—of the agent does not amount to "presence" of the principal. They do not apply in situations where the activities of the agent are continuous, systematic and are the cause of the liabilities sued upon. This distinction was quite forcibly made by this Court in the *Cannon* case when it said:

> "There is here no attempt to hold the defendant liable for an act or omission of its subsidiary, or to enforce as against the latter, a liability of the defendant." (Page 337.)

To the same effect is *Inductrial Research Corp.* v. *General Motors Corp.,* 29 F. 2d., 623, 626.

Where the activities of the subsidiary are systematic, continuous, substantial, and are the cause of the liabilities sued upon, this Court has been consistent in finding that the principal is present within the jurisdiction. In the *International Shoe* case, this Court rationalized the "presence" theory and summarized in one statement the long line of previous decisions which had undertaken to define "presence" as applicable to personal jurisdiction. It said at page 317:

> " 'Presence' in the State in this sense has not been doubted when the activities of the corporation there have been not only continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given" (citing numerous cases).

Moreover, for perhaps the first time in jurisdictional cases, the Court supplied an affirmative standard for guidance when, in speaking of the activities which the Courts will consider sufficient to satisfy the demands of due process, the Court said further at page 317:

> "Those demands may be met by such contacts of the corporation with the State of the forum as to make it reasonable, in the context of our Federal system of government to require the corporation to defend the particular suit which is brought there."

In this case the importance of Transport Terminal's operations in the conduct of petitioner's business is abundantly clear and was commented on by the Circuit Court of Appeals (R. 54, 55). Plainly they were far more substantial in character than those described in *International Harvester Co.* v. *Kentucky,* 234 U. S. 579; *St. Louis S. W. Ry.* v. *Alexander,* 227 U. S. 218, and *International Shoe Co.* v. *Washington,* 326 U. S. 310.

Petitioner also stresses the Circuit Court of Appeals'

use of the word "reduce" in referring to the underpayments made by Transport Terminal Co. immediately after the time of delivery. It maintains that the word "reduce" is not coextensive in meaning with the word "revise". By the improper submission of an affidavit attached to its petition for rehearing, it would have the Court believe that there had been no mathematical reduction accomplished at the time of payment. Actually, Transport Terminal Co. independently investigated and checked each bill as paid. Upon acceptance of the freight at the Chicago receiving facilities, the petitioner became liable for proper tariff charges, *P. C. C. & St. L.* v. *Fink*, 250 U. S. 577. Moreover, it was charged with the statutory duty of paying the correct charges. Whether or not it altered or allowed the original bills as submitted to remain unchanged is unimportant; its conscious act in paying charges lower than tariff rates was the cause of the institution of these proceedings.

The decision, therefore, of the Circuit Court of Appeals was eminently fair and reasonable. It is factual in nature and gives rise to no question calling for determination by this Court.

II.

Petitioner Was Not Validly Served With Summons Because the Person on Whom the Summons Was Served Was Not Its Officer or Agent.

(Petition, page 12.)

Petitioner maintains that the decision of the Circuit Court of Appeals upholding the validity of service upon Davis is contrary to the decisions of the Court in *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364, and *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333.

Such is not the case. In both decisions, this Court held

that the principal was not doing business in the district where the suit was brought. Obviously, if the defendant is not present in the district, there exists no person upon whom service may be had. Conversely, no problem of this nature is presented when the principal is "present". It has been so held in *In Re Hohorst,* 150 U. S. 663, and in *Blum* v. *Postal Telegraph, Inc.,* 54 Supp. 899-900.

Petitioner further maintains that even though Transport Terminal was petitioner's agent, it would not follow that Transport Terminal's officers thereby became petitioner's agents for the purpose of service of process. If this were true it would only be necessary for a foreign corporation to incorporate its agent and thereby escape the consequences of its acts. The reasoning employed by the Circuit Court of Appeals was correct.

III.

The Holding of the Circuit Court of Appeals That Its Decision Is Controlled by Commercial Casualty Insurance Co. v. Consolidated Stone Co., Despite the Promulgation of the Federal Rules of Civil Procedure, So That the Venue Privilege Was Waived by Permitting Default Judgment to Be Entered, Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

(Petition, page 13.)

To support its contention under this point, petitioner attempts to nullify *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.,* 278 U. S. 177 by showing that under Rule 12 (b) the defense of venue may now be joined with a defense to the merits, a practice which did not exist at the time the *Commercial Casualty* case was decided. Respondents agree that both defenses are on the same footing from the standpoint of the time when they should be

asserted. The defense of venue must now be raised not later than the time required for the filing of an answer to the merits. Thus, Rule 12 (b) and Rule 12 (h) which provides that all defenses not presented are considered waived, specifically incorporate the holding of this Court in the *Commercial Casualty* case.

In the original proceedings petitioner made no attempt to invoke the application of Rule 60 (b) and respondents can perceive no reason why reference should be made to it at this time. Moreover, petitioner's assertion that any defense including venue could be interposed after vacation of judgment under Rule 60 (b) is directly contrary to *Orange Theatre Corp.* v. *Rayhertz Amusement Co.*, 130 F. 2d. 185 and its companion case, *Orange Theatre Corp.* v. *Rayhertz Amusement Corp.*, 139 F. 2d. 871.

Respectfully submitted,

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By .....